IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 361 of 2000

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

HONOURABLE MR.JUSTICE K.A.PUJ

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SHANKARBHAI ANANTRAY RAJPUT - Appellant(s)
Versus
STATE OF GUJARAT - Respondent(s)

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Appearance:
MS. SADHNA SAGAR,APPOINTED BY LEGAL AID COMMITTEE for appellant
MR KT DAVE ADDL. PUBLIC PROSECUTOR for respondent

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CORAM :HONOURABLE MR.JUSTICE A.M. KAPADIA

AND

HONOURABLE MR.JUSTICE K.A. PUJ

Date : 16/11/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. The appellant ('accused' for short) was tried by the learned Additional Sessions Judge, Court No.9, City Sessions Court, Ahmedabad in Sessions Case No. 180 of 1998 for commission of the offences punishable under Section 21 read with Section 8 (c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS act' for short) arraigned on charge of having been found with contraband article 'brown sugar' contained in 28 pouches weight of which was 2 grams and 740 milligrams, without pass or permit when he was intercepted and apprehended near Mohanlal's Dehla near Chhanana Hanuman's chawl, on 1.5.1998 on the basis of the prior information received by

P.W.7, R.K. Bhatt, PI of Narcotic Cell, Ahmedabad. At the end of the trial, the accused was found guilty of the offences with which he was charged and as his complicity is proved, the learned trial Judge convicted him vide judgment and order dated 5.7.1999 and sentenced him to suffer RI for ten years and fine of Rs. 1 lakh i.d., RI for further period of six months. Aggrieved by the aforesaid order of conviction and sentence, the accused has filed this appeal under Section 374 of the Code of Criminal Procedure ('the Code' for short).

2. Briefly stated the prosecution case is that:

2.1. P.W.7, R.K. Bhatt, PI received a secret information from his informant which was noted down in the register kept for that purpose and conveyed to his superior officer immediately. As per the said information, below a neem tree, a swarthy person, wearing sky blue coloured safari, was to come at Mohanlal's Dehla near Chhanana

Hanuman's chawl on 1.5.1998 between 16.00 and 17.00 hours for selling brown sugar kept in pouches. He, therefore, called two panchas and conveyed the said information to them as well as to the members of the raiding party and preliminary panchnama was drawn to that effect and thereafter left for the raid. At the place and under the neem tree as mentioned in the secret information, the raiding party found a person with all identities as described in the secret information. Therefore, the raiding party approached him and informed that they are police officers and they want to search him and if he opts to be searched in presence of an Executive Magistrate or a Gazetted Officer, they can make necessary arrangement for the same but as the accused did not express any desire to be searched in presence of an executive magistrate or a gazetted officer and permitted RK Bhatt to search him, RK Bhatt searched the accused and during the search 28 pouches packed in butter paper were seized from the right side pocket of

the pant of the accused. One pouch was opened and the powder contained in it was taken out and it was found to be brown sugar. Thereafter the powder of all the other pouches were taken and kept in a plastic bag. It was weighed and weight of the same was 2 grams and 740 milligrams. The said colourless plastic bag containing powder was sealed and put in a tin box and it was sealed affixing slip containing signatures of panchas and RK Bhatt. Accordingly the second part of the panchnama was drawn.

2.2. P.W.4, Vinubhai R. Patel, PSI lodged a complaint in respect of the aforesaid incident at Gomtipur Police Station against the accused for commission of the offences punishable under Section 21 read with Section 8 (c) of the NDPS Act. Along with the said complaint, he also handed over other papers, muddamal and the accused to Gomtipur Police Station.

2.3. Pursuant to the registration of the

complaint, investigation was handed over to P.W.4, Vinubhai R. Patel, PSI. During the course of investigation, he recorded statements of the witnesses and arranged to send the muddamal brown sugar recovered from the accused to FSL for chemical analysis. On receipt of the report from the FSL certifying that the muddamal sent for analysis was brown sugar and as sufficient incriminating evidence was found against the accused, he filed charge-sheet against the accused for commission of the offence punishable under section 21 (b) read with section 8 (c) of the NDPS Act, in the City Sessions Court, Ahmedabad.

2.4. The learned Additional Sessions Judge, Court No.9, City Sessions Court, Ahmedabad to whom the case was made over for trial, framed charge against the accused for commission of the offences punishable under Sections 21 (b) read with Section 8 (c) of the NDPS Act which was read over and explained to him. As the accused

pleaded not guilty to the charge and claimed to be tried, he was put to trial and tried in Sessions Case No.180 of 1998.

2.5. To prove the culpability of the accused, the prosecution has examined in all 9 witnesses the details of which are given in para 3 of the impugned judgment and order. They are as under:

PW No	Name	Ex. No	Page No
1	Dipsinh Virsinh	8	39
2	Jaivirsinh Mulubha Zala	11	43
3	Bharatbhai Nagarbhai Dodia	15	45
4	Vinubhai Ranchhodbhai Patel	18	47
5	Bhailalbhai Kantilal Barot (Panch witness)	21	55
6	Bharatkumar Pravinkumar Panchal (Panch witness	25	61
7	Ravindrakumar Kashiram Bhatt	27	65
8	Gunvantbhai Harkhabhai Algotar	40	81
9	Markandbhai Kantilal Pathak	44	85

2.6.To prove the case against the accused, the prosecution also produced and relied upon documentary evidence in the form of complaint, panchnama, copy of letter by which the secret

information was conveyed to superior officer by RK Bhatt, PI, FSL report, etc.

2.7. After recording of the evidence of the prosecution witnesses was over, the learned trial Judge explained to the accused the circumstances appearing against him in the evidence of the prosecution witnesses and recorded his further statement as required under Section 313 of the Code. In his further statement, the accused denied the case of the prosecution in toto. He, however, did not lead any evidence nor did he examine any witness in support of his defence.

2.8. On appreciation, evaluation, analysis and close scrutiny of the evidence adduced by the prosecution, the learned trial Judge held that the prosecution has proved its case beyond all reasonable doubts. Though independent witnesses like panchs have not supported the prosecution case, on appreciation of other evidence on record, the prosecution has succeeded in proving

the complicity of the accused and, therefore, he found the accused guilty of the offence and recorded the order of conviction and sentence to which reference is made in earlier paragraph of this judgment, which has given rise to instant appeal at the instance of the accused.

3. Ms. Sadhna Sagar, learned advocate appointed by the Legal Aid Committee to assist the accused, has contended that the prosecution has examined the members of the raiding party who have not followed the mandatory and statutory provisions contained under the NDPS Act and, therefore, on account of non-compliance of the mandatory as well as statutory provisions of NDPS Act, the prosecution evidence cannot be relied upon and cannot be acted upon. In the complaint filed by the prosecution, nowhere it is stated that 'brown sugar' was found from the accused. It is also contended by her that the contents of the 28 pouches allegedly recovered from the accused were put in one plastic bag which was sealed and

sent to FSL for chemical analysis, which is not permissible in law. It is also highlighted by her that the prosecution has not been able to successfully establish that the contraband article which was sent to FSL was not tampered with during the course of its journey from filing of the complaint to the stage of its reaching the FSL. It is also emphatically submitted by her that independent witnesses i.e., panch witnesses, have not supported the prosecution case with regard to the recovery of the brown sugar, seizure and sealing of the same and, therefore, the contents of the panchnama are not proved and in that view of the matter the prosecution was not able to prove the culpability of the accused for commission of the offence punishable under Section 21 (b) read with Section 8 (c) of the NDPS Act. On the aforesaid premises, it is submitted by her that the impugned judgment and order deserves to be quashed and set aside by allowing this appeal and thereby acquitting the accused of the offence with which he was charged.

She, therefore, urged to allow the appeal.

4. In counter submission, Mr. KT Dave, learned APP for respondent – State of Gujarat, has submitted that by voluminous evidence produced by the prosecution, the complicity of the accused is proved beyond reasonable doubt. The accused was found and caught red-handed with contraband article brown sugar in 28 pouches. It is also submitted by him that after following and observing mandatory and statutory provisions contained under the NDPS Act, the contraband article was seized and sealed in presence of the members of the raiding party as well as panchas. FSL report in terms certified that the said contraband article which was sent for analysis was heroin, popularly known as 'brown sugar'. It is also highlighted by him that the prosecution has successfully established that the sample was not tampered with during the course of the journey from the stage of filing of the complaint till it reached the FSL and in that connection

the prosecution has examined a number of police officers from whose hands the contraband article was passed and reached to FSL. It is also pointed out by him that though the panchas have turned hostile and have not supported the prosecution case it does not weaken the case of the prosecution. He has submitted that it is not unknown to criminal jurisprudence about the panchas turning hostile and that now-a-days it is on increase. However, the case does not depend solely on the evidence of the panch witnesses. If the evidence of the members of the raiding party is of sterling quality then there is no reason to discard their evidence and on the basis of the evidence of the members of the raiding party order of conviction can be passed. On the aforesaid premises, according to him, the prosecution has established the case beyond reasonable doubt and, therefore, the learned trial Judge has rightly recorded the order of conviction and sentence and the impugned judgment and order does not warrant any interference of

this court in this appeal and the appeal lacks merits deserves to be dismissed. He, therefore, urged to dismiss the appeal.

5. This Court has considered the submissions advanced by the learned advocates appearing for the parties and perused the impugned judgment and order. This Court has undertaken a compete and comprehensive appreciation of all vital features of the case and the entire evidence on record which is read an re-read by the learned advocates for the parties with reference to broad and reasonable probabilities of the case. In light of the caution sounded by the Supreme court while dealing with NDPS cases, this court has examined the entire evidence on record for itself independently of the learned trial Judge and considered the arguments advanced on behalf of the accused and infirmities pressed, scrupulously with a view to find out as to whether the learned trial Judge has rightly recorded the order of conviction and sentence.

6. At the outset, be it noted that to combat illicit drug traffic and drug abuse, both at the national and international levels, the penal provisions contained under the NDPS Act are stringent and punishment thereunder is harsh, therefore, as per the settled principles of criminal jurisprudence, the Court of law must insist on the strict compliance of the safeguards provided under the statutory provisions contained thereunder.

7. In this connection, it would be appropriate to refer to the observations made by the Supreme Court in the case of Bharatbhai Bhagwanjibhai v. State of Gujarat, AIR 2003 SC 7. In para 1 of the said judgment, the Supreme Court has observed as under:

> “The Statement of Objects and Reasons of the NDPS Act categorically records the inadequacy of the existing legislation to combat illicit drug traffic and drug abuse, both at the

national and international levels and it is by reason of such deficiencies in the existing laws, the legislature thought it prudent to consolidate the same and bring about a comprehensive legislation so as to meet the exigencies of the situation. A plain look at the provisions of the NDPS Act read with the Statement of Objects and the Preamble would depict the intent of legislature as regards the offences under the said consolidated legislation, which stands expressed in rather explicit language as one of the most heinous ones in nature. This Court, however, in consonance with criminal jurisprudence of the country has been insisting on strict compliance of the safeguards provided under the statute so as to be in tune therewith".

8. In view of the stringent penal provisions and harsh punishment provided thereunder and in view of the observations made by the Supreme Court in

the above referred to judgment, we have to find out as to whether in instant case strict compliance of the safeguards provided under the statute have been observed by the Police Inspector during the course of search of the accused and seizure of the muddamal, contraband article, brown sugar.

9. In this connection, we shall first refer to the testimony of P.W.7, Ravindrakumar K. Bhatt, Ex.27, page 65 of the paper book. He has, inter alia, testified that he received secret information on 1.5.1998 to the effect that a swarthy person who had put on sky blue coloured safari is selling brown sugar kept in pouches below neem tree between 16.00 and 17.00 hours near Mohanlal's Dehla near Chhanana Hanuman's chawl. He recorded the said secret information in his own hand writing in the register kept for the said purpose and conveyed the said information in writing to his superior officer. The said secret information noted down by RK

Bhatt PI is on record at Ex.28. The said information was conveyed to his superior officer, Vikas Sahay, Narcotic Superintendent, and on the office copy of the said message, there is signature of Vikas Sahay. The office copy of the said message is on record at Ex.29 and the signature of Vikas Sahay is proved by the evidence of RK Bhatt. Thereafter RK Bhatt requisitioned the presence of two persons to act as panchas to whom and also to the members of the raiding party he conveyed the secret information received by him and preliminary panchnama was drawn in the police station. Thereafter he, along with the members of the raiding party and PW 4, VR Patel, PSI, gone to the place described in the secret information and kept watch for the accused. As they found a person satisfying the description given in the secret information in all respects, RK Bhatt approached him and told him that they are police personnel and they want to search his person. He also informed him that if he wanted to be searched in presence of an Executive Magistrate or a gazetted officer, he

will do so and for that purpose necessary arrangements will be made by him but the accused did not express any desire to be searched in presence of an Executive Magistrate or a gazetted officer and permitted RK Bhatt to be searched his person and, therefore, RK Bhatt searched his person. During the search of the person of the accused, 28 pouches from the right side pocket of the pant put on by the accused were recovered. Out of that, one pouch was opened and on testing it, it was found to be brown sugar. Therefore the said contraband article was seized and on weighing it, it was noticed that the said contraband article was weighing 2 grams and 740 milligrams. The said colourless plastic bag containing the powder was sealed and put in one tin box and it was sealed putting slip containing signatures of panchas and RK Bhatt. Accordingly, the second part of the panchnama was completed. The said muddamal was handed over to P.W.4, VR Patel, PSI. P.W. 7 RK Bhatt, PI withstood the test of cross-examination successfully and nothing substantial which could impeach his

credibility could be brought out in his cross-examination.

10. The prosecution thereafter examined and relied upon the evidence of PW 4, VR Patel, PSI, Ex.18, page 47 of the paper book. He has testified that on 1.5.1998 he was serving as PSI at Narcotic Cell, CID Crime. On that day, PW 7, RK Bhatt, PI, received a secret information which was noted down in the concerned register and the said secret information was conveyed in writing to his superior officer by RK Bhatt. Thereafter Panchas were called through police constable Vinod Dantani. After that RK Bhatt, PI, conveyed the secret information received by him to panchas and other members of the raiding party that one person named Shankerbhai Rajput who is swarthy and wearing sky blue coloured safari sells brown sugar in pouches between 16.00 and 17.00 hours under a neem tree situated at Mohanlal's chawl, at Gomtipur Kanya Shala No.5. After taking the instrument for raid, they started in two vehicles towards Shital Talkies

where they parked their vehicles and went further at Mohanlal's chawl and waited in watch for the person described in the secret information. At about 16.15 hours, a person answering the description given in the secret information came there, who was caught by RK Bhatt, PI, and the police constable Dantani. After that the members and panchas went there. RK Bhatt, PI, asked his name and he answered that he is Shankerbhai Rajput. Then he was informed that they are police officers and they are in search of narcotic substance and they want to search him but if he desires to be searched before an Executive magistrate or a gazetted officer, then they will make arrangement for the same. But he did not exercise the option offered by RK Bhatt and said that he may be searched by RK Bhatt. His signature was taken to the effect that such an offer was made to him but he refused to accept the said offer. Then his person was searched and during search, from right side pocket of his pant, 28 pouches were recovered. One pouch was opened and it was tested with the help of tools

in the kit box and it was found to be brown sugar. Then all the 28 pouches were opened. Powder contained in all the 28 pouches were taken in one plastic bag and other empty butter papers of pouches were taken in another plastic bag. One tin was called for and plastic bag containing brown sugar was sealed affixing the seal of Police Inspector NDPS, GS written in English. The paper containing the signature of panchas and RK Bhatt was affixed before sealing the bag. The second bag containing empty butter papers was also sealed and panchnama was drawn there. On weighing, it was found that the brown sugar was weighing 2 grams and 740 milligrams. Thereafter a complaint was filed by him, at Gomtipur Police station, which is at Ex.19. He successfully withstood the test of cross-examination and nothing substantial which could impeach his credibility could be brought out from his cross-examination.

11. The prosecution thereafter examined and relied upon the evidence of P.W.1, Dipsinh

Virsinh, Ex.8, at page 39 of the paper book. According to him, he was serving as a Crime Writer Head Constable. On 1.5.1998 he received muddamal from PSO, Unarmed Head Constable Jaivirsinh and made necessary entry in the concerned register in that regard. He has further testified that he sent the said muddamal with Unarmed Police Constable Bharatbhai Nagar on 2.5.1998 to FSL and it was sent in sealed condition and necessary entry regarding having handed over the muddamal to Bharatbhai Nagar for delivering it at FSL is also made in the register in his own hand writing. He has also made necessary entry in the register regarding receipt issued by the FSL with regard to receipt of the muddamal, which was given to him by Unarmed Police Constable Bharatbhai Nagarbhai on 2.7.1998 and on that there is signature of Bharatbhai Nagarbhai also. On 3.7.1998 the muddamal was sent to the Court and the said muddamal was taken to Court by Police Constable Mavatsinh Udesinh. All these entries are on record at Ex.9. He was also cross-examined at length but nothing substantial

could be brought out to disbelieve his testimony.

12. The prosecution has thereafter examined and relied upon the testimony of P.W.2, Jaivirsinh Mulubha Zala, Ex.11, page 43 of the paper book. He was working as Head Constable (PSO) at the relevant time and according to him on 1.5.1998 at about 16.15 hours VR Patel PSI of CID Crime came to the police station and handed over complaint, panchnama and other documents along with the accused and muddamal. He has further testified that he made entry in this regard in the crime station diary. The said entry is at Ex.12. He prepared the muddamal receipt which is at Ex.13. He has further deposed that he handed over the muddamal to Crime Writer Dipsinh. From the evidence of Jaivirsinh Zala and Dipsinh Virsinh it is evident that on 1.5.1998 the muddamal was received at Gomtipur Police Station from VR Patel PSI and the same was sent to FSL for chemical analysis.

13. The prosecution has thereafter examined PW 3,

Bharatbhai Nagarbhai Dodia, Ex.15, at page 45 of th paper book. He is the person who has taken the muddamal to FSL and brought it back. Nothing substantial was found from his cross-examination to disbelieve his testimony.

14. From the evidence of P.W.1, P.W.2 and P.W.3 it is duly proved that the muddamal was received at the police station by PSO, Gomtipur Police station, he made necessary entry in this regard in the concerned register, the muddamal was sent to FSL for analysis with PW 3 and PW 3 brought it back after analysis by FSL.

15. The prosecution has thereafter examined P.W.8, Gunwantbhai Harkhabhai Aglotar, Ex.40, at Ex.81 who was Second PI at Gomtipur Police Station at the relevant time. He has recorded the statement of the witnesses and field the charge-sheet.

16. The prosecution has thereafter examined and relied upon the testimony of P.W.9, Markandbhai

Kantilall Pathak, a Scientist, Ex.44, at page 85, who has carried out the test on the muddamal sent to FSL by Gomtipur police station for analysis. He has supported the case of the prosecution.

17. Thereafter the prosecution has examined P.W.5, Bhailalbhai Kantilal Barot, Ex.21, at page 55 of the paper book and P.W.6, Bharatkumar Pravinkumar Panchal, Ex.25, at page 61 of the paper book who were present at the time of raiding, seizure of the contraband article and sealing of it. As they turned hostile, they are declared as hostile and the learned APP has cross-examined them at length.

18. It is contended by Ms. Sagar, learned advocate of the accused, that PW 5, Bhailalbhai Kantilal Barot, Ex.21 and PW 6, Bharatkumar Pravinkuamr Panchal, Ex.25, who are panch witnesses and said to be independent witnesses, have not supported the prosecution case and, therefore, the prosecution has failed to prove

the panchnama and hence the prosecution case cannot be believed. According to this Court, the aforesaid submission is absolutely feeble and has no substance and merit.

19. It is well settled that merely because the panch witnesses do not support the case of the prosecution, the case of the prosecution need not be thrown over-board as unreliable. It may be realized that the phenomenon of panch witnesses turning hostile to the prosecution is not unknown and is ever on the increase. It needs hardly to be emphasised that the decision of a case does not depend solely on the question whether the panch witnesses support the prosecution or turn their back on it. If the decision of the case were to depend solely on the testimony of panch witnesses regardless of the evidence of police officers, in theory, it would be giving a right to veto to the panchas so far as the question of culpability of an accused is concerned, which is not permissible in criminal jurisprudence. It is well settled that without good ground being

pointed out, testimony of police officer, if otherwise found to be true and dependable, cannot be discarded by court on the ground that he is a police officer. on the facts and in the circumstances of the case, this Court finds that the testimonies of P.W, 1, 2, 3, 4, 7, 8 and 9 not only inspiring confidence but get corroboration from the other evidence on record and from the evidence of P.W.7, the contents of panchnama are proved, which is on record at Ex.35.

20. It is also contended by Ms. Sagar, learned advocate of the accused, that the FSL expert has not stated that the material alleged to have been recovered from the accused is brown sugar. According to this Court, this submission has also no substance. It is true that in the NDPS Act definition of 'brown sugar' is not given but the substance or component shown in the FSL report contends that it is a substance containing the narcotic substance. The opinion of the expert at Ex.42 clearly states that the substance sent for

chemical analysis contains opium alklodies like morphine, codein, thibain, popavahin and narcotic and opium. These components are narcotic substances and keeping this narcotic substance in possession without pass and permit is an offence. Therefore non-mentioning of the word 'brown sugar' does not mean that the accused has not committed the offence alleged against him. Moreover, 28 pouches were found from the accused. The number of pouches is not small. Moreover, the information received by the police is that the accused is the person selling brown sugar in pouches and recovery of pouches supports that information and so concoction of a fictitious case against the accused by the police does not arise. Therefore, the submission of Ms. Sagar is baseless.

21. On overall view of the matter, according to this Court, the mandatory and statutory provisions contained under sections 42 (1), 42 (2) and 50 of the NDPS Act have been adhered to and complied with by RK Bhatt, PI and it is duly

proved by the evidence of the prosecution witnesses. RK Bhatt, PI had taken utmost care and caution while seizing and sealing the said contraband article. The apprehension of tampering with the muddamal can be ruled out as from the stage of recovery of the muddamal till its reaching the FSL, proper care and caution was taken by the police personnel. It is on the contrary clearly proved that it was in the safe hands of police personnel and it reached at FSL intact in sealed condition for chemical analysis. Thus the complaint at Ex.13 and Panchnama at Ex.35 are duly proved.

22. In view of the aforesaid evidence, there is no manner of doubt that when the accused was intercepted, apprehended and searched, he was found to be in possession of contraband article brown sugar. Necessary formalities of search and seizure were made in presence of panchas and complied with the requirements and observed all the formalities contained under the NDPS Act, samples were sent to FSL after following the

procedures under the NDPS Act.

23. On close scrutiny of the evidence on record, we find no infirmities in the findings, ultimate conclusion and the resultant order of conviction and sentence recorded by the trial court. We are in complete agreement with the said findings, ultimate conclusion and resultant order of conviction and sentence passed by the trial court, as according to us, no other conclusion is possible except the one reached by the trial court in the facts and circumstances of the case.

24. No new argument is advanced. No new criticism is offered. No infirmity in the reasoning of the trial court is pointed out. The evidence has been carefully analyzed and fully appreciated in the closely reasoned judgment with which we fully concur. We do not think it right to invest public time in reiterating the same reasoning in our language or giving the same answers to the same criticism in our own words for the sake of form.

25. In aforesaid view of the matter, there is no reason or justifiable ground to interfere with the impugned judgment and order of conviction and sentence. The sentence awarded to the accused is minimum and has to be maintained.

26. On the wake up of the aforesaid, we are not inclined to interfere with the judgment and order of conviction and sentence recorded by the trial court and hence the appeal lacks merit, deserves to be dismissed.

27. For the foregoing reasons, the appeal fails and accordingly it is dismissed.

(A.M. Kapadia, J.)

(K.A. Puj, J.)

(karan)